Cordova v. Terhune, 05-15322

BEA, Circuit Judge, dissenting:

I respectfully dissent from the majority's determination to grant Johnny Cordova an evidentiary hearing on his ineffective assistance of counsel claim related to his trial counsel's advice regarding the offered plea agreement. As the majority explains:

> Cordova contends his trial counsel was deficient by advising him that a twelve-year plea offer "would always be there" and by failing to inform him until after the motion to dismiss had been denied that the plea offer had been withdrawn.

Majority at 4.

Ineffective assistance of counsel requires the defendant to show that counsel's performance fell below an objective standard of reasonableness and that the errors made were so serious as to deprive defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689.[1] In addition, because

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[1] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the

Cordova is in custody pursuant to a judgment of a state court, we may not grant a writ of habeas corpus unless the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

Counsel's statement that the plea offer "would always be there" is consistent with the representation that the plea offer was open-ended, and there is no evidence that the offer was not open-ended when made. Contrary to the majority's assertion, counsel's statement was not an "affirmative misrepresent[ation]." Majority at 5. In fact, the plea agreement remained available for more than a month. Any further "implication" that the plea offer would remain available notwithstanding Cordova filing a motion to dismiss could not reasonably have been relied upon as a statement of fact. At most, this "implication" reflected counsel's opinion regarding the potential future conduct of the prosecutor. [2]

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challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (citing *Mitchel v. Louisiana*, 350 U.S. 91, 101 (1955)).

[2] The majority is flatly wrong to say defense counsel's alleged statement that the offer "would always be there" was "plainly false." There is no allegation, much less any evidence, that defense counsel knew the prosecutor would retract

To establish a claim for ineffective assistance of counsel, Cordova must allege facts which establish that he relied on something more than defense counsel's guess about the future conduct of a third party. Here, however, Cordova has not alleged defense counsel made a representation about a matter upon which he could reasonably have relied.[3] Because Cordova has failed to establish that his counsel's performance fell below an objective standard of reasonableness, it was not an unreasonable application of *Strickland* for the California state courts to deny Cordova's habeas claim of ineffective assistance of counsel.

Even assuming, as the majority concludes, that counsel's failure to inform Cordova that the plea offer had been withdrawn after the motion to dismiss was filed constitutes ineffective assistance, Cordova has failed to establish he was prejudiced by his counsel's performance. Cordova asserts that had he known the plea agreement had been withdrawn after his motion to dismiss was filed, he would have instructed his counsel to attempt to resurrect the offer by withdrawing the

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the offer. Furthermore, there is not a word of evidence the prosecutor had such a practice or had stated such an intention.

[3] In California, even after a defendant has accepted a plea offer, which Cordova did not, "a prosecutor may withdraw from a plea bargain before a defendant pleads guilty or otherwise detrimentally relies on that bargain." *People v. Rhoden*, 89 Cal. Rptr. 1346, 1354 (Cal. Ct. App. 1999). Furthermore, it is well established in California that all individuals are charged with knowledge of the law. *See People v. O'Brien*, 96 Cal. 171, 176-77 (1892).

motion to dismiss. What Cordova fails even to allege is that the prosecutor would have agreed to resurrect the plea agreement if the motion to dismiss were withdrawn.[4] Absent any evidence, or even assertion, that the prosecutor would have agreed to resurrect the plea agreement after it had been withdrawn, it was not an unreasonable application of *Strickland* for the California state courts to deny Cordova's habeas claim of ineffective assistance of counsel. *See Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir. 1997) (finding that, in light of defendant's claim of innocence and counsel's advice that the case against him was "weak," defendant failed to establish prejudice resulting from his counsel's failure to inform him of a plea offer because defendant failed to prove there was a reasonable probability he would have accepted the offer).

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[4] Addressing both of counsel's alleged deficiencies in a single sentence, the majority concludes Cordova was prejudiced because "had Cordova been properly advised, he alleges he would have accepted the twelve-year offer." Majority at 5. Although this claim of prejudice may apply to counsel's alleged deficiency in advising Cordova that the plea offer "would always be there" it does not address counsel's delay in advising Cordova that the plea offer had been withdrawn. Cordova could not have accepted the plea after it was withdrawn, even if he had immediately been so informed, because the plea offer was no longer available. What the majority fails to recognize is that to establish prejudice from counsel's delay in informing Cordova that the plea offer had been withdrawn, Cordova must establish that his timely knowledge of the withdrawn plea would somehow have resulted in the prosecutor agreeing to reinstate the offer, which he then would have accepted. Perhaps one reason Cordova does not even allege that the prosecutor would have agreed to resurrect the offer is that Cordova alleges he was subjected to vindictive and selective prosecution.

"In habeas proceedings, an evidentiary hearing is required when the petitioner's allegations, if proven, would establish the right to relief." *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998). "However, an evidentiary hearing is *not* required on issues that can be resolved by reference to the state court record." *Id*. (emphasis in original). Because I disagree with the majority's conclusion that Cordova's allegations, if established, would entitle him to relief, I would not grant an evidentiary hearing. "Habeas is an important safeguard whose goal is to correct real and obvious wrongs. It was never meant to be a fishing expedition for habeas petitioners to explore their case in search of its existence." *Rich v. Calderon*, 187 F.3d 1064, 1067 (9th Cir. 1999) (citing *Calderon v. U.S.D.C. (Nicolaus)*, 98 F.3d 1102, 1106 (9th Cir. 1996).